

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED & INSPECTED

OCT 10 2002

FCC-MAILROOM

In the matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 01-11
FM Broadcast Stations.)	RM-10027
(Murrieta, Arcadia, Fallbrook,)	RM-10322
Yucca Valley, and Desert Hot Springs,)	
California).')	
)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted September 25, 2002

Released: October 9, 2002

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a *Notice of Proposed Rule Making* ("NPRM") in this proceeding? issued in response to a rulemaking petition filed by Helen Jones (the "Jones Petition"), comments filed by BK Radio ("BK") and the petitioner, and a counterproposal filed by Big City Radio-LA, L.L.C. ("Big City") with the consent of Moms Communications Corporation ("Moms"). Reply comments to the *Public Notice*³ announcing the filing of the counterproposal were filed by the petitioner. After the pleading cycle ended, Big City and the petitioner filed a joint motion for leave to file an amendment, seeking to eliminate the conflict between the petitioner's and Big City's proposals; and Big City filed an amendment to comments and counterproposal. Thereafter, Big City and the petitioner filed a supplement to joint motion for leave to file.⁴ Finally, in response to a staff request for additional information, Big City filed an engineering amendment.

BACKGROUND

2. The Jones Petition requests the allotment of Channel 281A at Murrieta, California, as a first local aural service. An *NPRM* was subsequently released, proposing the Murrieta allotment. The *NPRM* stated that Murrieta is an incorporated community with a 1990 U.S. Census population of 18,723 and a 1999 estimated population of 41,500. As noted in the *NPRM*, Murrieta is located within 320 kilometers (199 miles) of the U.S.-Mexican border, and Channel 281A at Murrieta is short-spaced to Station XHBA-FM, Channel 281C, Mexicali, BN, Mexico. Accordingly, concurrence in the proposal as a specially-negotiated, short-spaced allotment must be obtained from the Mexican government.

¹ The communities of Arcadia, Fallbrook, Yucca Valley, and Desert Hot Springs, California, have been added to the caption.

² Murrieta, CA, 6 FCC Rcd 2154 (M.M. Bur. 2001)

³ Report No. 2506, October 5, 2001.

⁴ We will accept the filing of the amendment and supplement because they will facilitate resolution of this case based upon a full and complete factual record without prejudicing any other party.

COMMENT SUMMARY

3. In response to the NPRM, the petitioner filed the requisite continuing expression of interest in applying for Channel 281A at Murrieta and promptly constructing a station on the channel, if awarded a construction permit. BK also filed an expression of interest in applying for and building a station on the proposed Murrieta allotment.

4. Big City, the licensee of Stations KLYY(FM), Channel 296A, Arcadia, California, and KSYY(FM), Channel 296A, Fallbrook, California, filed a counterproposal, seeking to upgrade Station KLYY(FM). Specifically, Big City proposed to substitute Channel 296B1 for Channel 296A at Arcadia and to modify the license for Station KLYY(FM) accordingly. To accommodate the upgrade at Arcadia, Big City proposed two other channel changes. First, Big City requested the substitution of Channel 281A for Channel 296A at Fallbrook, California, and the modification of its license for Station KSYY (FM) accordingly. Second, Big City proposed, with the consent of Morris, the downgrade and change of community of license for Morris' Station KYOR(FM), Channel 295B, Yucca Valley, California, pursuant to the provisions of Section 1.420(i) of the Commission's Rules: which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest. Specifically, Big City proposed the substitution of Channel 295B1 for Channel 295B at Yucca Valley, the reallocation of Channel 295B1 to Desert Hot Springs, and the modification of Morris' license for Station KYOR (FM) to specify operation on Channel 295B1 at Desert Hot Springs. This counterproposal is mutually exclusive with the NPRM's proposal because Channel 281A at Fallbrook is short-spaced to the proposed allotment of Channel 281A at Murrieta.⁶ However, Big City identified an alternate channel for use at Murrieta – Channel 245A – that would preserve the requested first local service at Murrieta and would be compatible with Big City's arrangement of allotments and proposed that this alternate channel be allotted to Murrieta.

5. Big City contends that grant of its counterproposal would provide several public interest benefits. First, it would provide a first local aural transmission service to Desert Hot Springs, a census designated community of 11,686 persons according to the 1990 Census. Second, Big City argues that the upgrade of Station KLYY(FM) on Channel 296B1 at Arcadia would improve two longstanding, short-spacings on second adjacent channels that were grandfathered in 1964 and would eliminate a third grandfathered short-spacing. Specifically, the short spacing between Station KLYY(FM), Arcadia, and Station KROQ-FM, Channel 294B, Los Angeles, California, would be reduced from 47.6 kilometers to 27.6 kilometers, and the short-spacing between Station KLYY(FM), Arcadia, and Station KLVE-FM, Channel 298B, Los Angeles, would be decreased from 62.5 kilometers to 41.8 kilometers? Also, the substitution of Channel 281A for Channel 296A at Fallbrook would eliminate the existing 2.8 kilometer short-spacing between Station KSYY(FM), Channel 296A, Fallbrook, and Station KYOR(FM), Channel 295B at Yucca Valley, California. Big City further contends that the reduced short-spacings are permissible for allotment purposes because they "will automatically satisfy [Section] 73.213 protection requirements to both KLVE(FM) and KROQ-FM (because Section 73.213 no longer requires protection of second-adjacent channel related grandfathered short-spaced stations.)" Third, although Big City acknowledges that, using 1990 U.S. Census figures, the upgrade at Arcadia and the related channel change at Fallbrook would result in a loss of service to 2,843,612 persons in the primary service contours (i.e., 60 dBu contour for Class A, 54 dBu contour for Class B, and 57 dBu for Class B1) for Stations KLYY(FM) and KSYY(FM), it contends that the proposed arrangement of allotments will allow

⁵ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁶ See 47 C.F.R. §73.207.

⁷ The required spacing between second adjacent Class B and B1 stations is 71 kilometers.

⁸ Comments and Counterproposal of Big City, Technical Statement at 4.

2,673,525 persons to receive new primary service coverage from Stations KLYY(FM), KSYY(FM), KYOR(FM), and the new Murrieta facility, and that the loss areas remain well served by five or more existing aural services.

6. With respect to the proposed change of community proposal for Station KYOR(FM), Big City notes that, operating on Channel 295B1 at Desert Hot Springs, the station will cover only 15.9% of the total Palm Springs Urbanized Area with a city-grade signal. Because the proposed reallocation would provide less than 50% city-grade coverage of the Palm Springs Urbanized Area and because Desert Hot Springs is not located within any Urbanized Area, Big City contends that a Tuck analysis is not required.⁹ Big City also notes that there will be a loss of service to 117,703 persons but that they will remain well served by five or more aural services.

7. The petitioner filed reply comments opposing Big City's counterproposal but subsequently withdrew these reply comments in the joint motion for leave to file an amendment. Generally, these reply comments argued that the allotment of Channel 245A at Murrieta, as suggested by the counterproposal, would be defective under Section 73.315(a) of the Rules because the channel would not provide city grade coverage to 100% of the community of Murrieta. Second, Jones argued that the first local service at Murrieta should be preferred over the first local service at Desert Hot Springs because Murrieta (pop. 44,282) has a larger population than Desert Hot Springs (pop. 16,582) under the 2000 Census. Third, the petitioner contended that Channel 296B1 cannot be allotted at Arcadia because Big City is relying on a faulty interpretation of Section 73.213(a)(4) of the Commission's Rules in concluding that the second and third adjacent spacing rules do not apply to pre-1964 grandfathered, short-spaced stations. On the contrary, Jones argued that such an approach would be warranted with respect to a facility change that increased the Arcadia station to maximum facilities within its current class of channel but is not permissible for an upgrade to a higher class of channel.

8. In their joint motion for leave to file, Big City and the petitioner request permission to file an amendment to eliminate the conflict over whether Channel 281A or Channel 245A should be allotted to Murrieta. Under the amendment, Channel 281A would be allotted to Murrieta as proposed in the *NPRM* and Channel 245A would be allotted to Fallbrook rather than Murrieta.¹⁰ The other channel changes proposed in the counterproposal at Arcadia, Yucca Valley, and Desert Hot Springs would remain the same. Since the amendment eliminates the conflict between the petitioner and Big City's proposals, Big City has agreed to reimburse the petitioner for her out of pocket expenses, not to exceed \$3,500 for legal and engineering review of Big City's counterproposal and for preparation and filing of her reply comments.

9. In its amendment to comments and counterproposal, Big City urges adoption of its technical solution with the petitioner and reiterates many of the public interest arguments set forth in its original counterproposal. It again asserts that the reduced short-spacings between Station KLYY(FM), Arcadia, and Stations KROQ-FM and KLVE(FM), Los Angeles, are permissible under Section 73.213(a)(4) because the Commission eliminated second and third adjacent spacing requirements for pre-

⁹ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (Allocations Br. 1995); and *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), *RKO General, Inc.*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹⁰ Big City contends that Channel 245A may be allotted to Fallbrook in conformance with the Commission's technical rules at reference coordinates of 33-27-01 and 117-07-33, which are the coordinates for the existing tower where Big City's FM translator station K252BF, Temecula, California, is currently located. Big City further argues that city grade coverage over the entire city limits of Fallbrook is predicted using "actual terrain" calculated pursuant to the Commission's F(50,50) curves in lieu of assuming uniform terrain and that this is permissible in this case under *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988) because Big City has a reasonable site assurance.

1964 grandfathered short-spaced stations in 1997.”

10. Big City and the petitioner then filed a supplement to their joint motion for leave to file, documenting the petitioner’s legal and engineering expenses. The supplement also contained affidavits from the petitioner and the president of Big City, stating that no consideration has been or will be paid or received in excess of the petitioner’s legitimate and prudent expenses relating to the prosecution of this proceeding.

11. Thereafter, in response to a staff inquiry, Big City provided revised figures for gain and loss in area and population from the proposed allotments, as well as existing aural services to these areas, using the methodology set forth under the Commission’s *Greenup, Kentucky*, case.¹² Big City provided gain and loss figures using the predicted 60 dBu contour for maximum facilities for all classes of stations involved in this proceeding. It also used 2000 Census data instead of 1990 Census figures. Comparing all proposals with this methodology, Big City asserts the proposed changes at Arcadia, Fallbrook, and Yucca Valley/Desert Hot Springs would result in a net increase in service to 2,310,009 persons. Additionally, 372,379 people will receive a new service from the Mumeta Class A assignment. Specifically, the Arcadia upgrade would result in a loss of service to 773,984 persons in an area of 553 square kilometers and a gain in service to 3,507,422 persons in an area of 2,867 square kilometers, for a net gain of 2,733,438 persons and 2,314 square kilometers. The substitution of Channel 245A for Channel 296A for Station KSYF(FM) at Fallbrook would result in a loss of service to 332,101 persons in a 526 square kilometer area and a gain of service to 36,115 in an area of 526 square kilometers, with a net loss of service to 295,986 persons and no loss of area. Finally, the downgrade and reallocation of Station KYOR(FM) from Channel 295B at Yucca Valley to Channel 295B1 at Desert Hot Springs will result in a loss of service to 143,782 persons in an area of 3,954 square kilometers and a gain of service to 16,429 persons in an area of 239 square kilometers, for a net loss of service to 127,353 persons and a net loss of area of 3,715 square kilometers.

12. Big City also submits documentation to show that the loss areas are generally well served with more than five aural services. It provides a range as to the number of stations serving these loss areas. It reports that the loss area from the Arcadia upgrade has a minimum of 24 stations and a maximum of 52 stations, that the loss area of the Fallbrook station has a minimum of four stations and a maximum of twenty stations but that no population exists in the area that receives only 4 aural services, and that loss area from the reallocation and downgrade of Station KYOR(FM) from Yucca Valley to Desert Hot Springs has a minimum of one station and a maximum of 19 stations. However, the loss area receiving only one aural service has no population, and the loss area receiving two aural services has only 22 persons. However, Big City acknowledges that there would be an area of 563.1 square kilometers and a population of 380 persons that would only receive 3 aural services as a result of this reallocation and downgrade.

DISCUSSION

13. As a threshold procedural matter, we will approve the withdrawal of the petitioner’s reply comments and her concomitant opposition to Big City’s counterproposal in this proceeding as consistent with Section 1.420(j) of the Commission’s Rules. Both Big City and the petitioner have submitted a copy of the written agreement between the parties and have documented that the maximum consideration of \$3,500 will not exceed the itemized, out of pocket expenses for legal and engineering review of the counterproposal and for the preparation and filing of the reply comments. They have also submitted affidavits from the petitioner and Big City’s president, corroborating that the consideration set forth in the

¹¹ *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840(1997).

¹² *See Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493(1991).

agreement is the only consideration that will be paid or received

14. We will allot Channel 281A to Murrieta because it will provide that community with a first local transmission service. Murrieta qualifies as a community for allotment purposes because it is incorporated and is listed in the 2000 U.S. Census with a population of 44,282 persons.” Channel 281A may be allotted to Murrieta at the allotment reference coordinates specified in the *NPRM*, which are 33-32-55 and 117-09-26. Also, Mexico has concurred in this allotment as a specially-negotiated, short-spaced allotment.

15. Although the parties have suggested a technical resolution to this proceeding that eliminates the conflict between the allotment of Channel 281A at Murrieta and Big City’s counterproposal, we will not grant the upgrade of Station KLYY(FM), Arcadia, from Channel 296A to Channel 296B1. Since the related channel substitution at Fallbrook and the reallocation and downgrade of Station KYOR(FM) from Yucca Valley to Desert Hot Springs were proposed to accommodate the upgrade at Arcadia, we will deny the entire counterproposal. We base our decision on four grounds.

16. First and foremost, even though the proposed upgrade of Station KLYY(FM) from Channel 296A to Channel 296B1 would reduce two pre-1964, grandfathered short-spacings to second adjacent Stations KROQ-FM, Channel 294B, Los Angeles, and KLVE(FM), Channel 298B, Los Angeles, the proposal is still short-spaced. We reject Big City’s contention that its Class B1 upgrade proposal is exempt from meeting the spacing requirements of Section 73.207 by operation of Section 73.213(a)(4) of the Commission’s rules. Specifically, Section 73.213(a)(4) provides:

For stations covered by this paragraph (a), there is no distance separation or interference protection requirements with respect to second-adjacent and third-adjacent channel short-spacings that have existed continuously since November 16, 1964.

In 1997, the Commission adopted this rule to “provide this group of [pre-1964] grandfathered stations with significantly greater flexibility in making transmitter site changes and other facility modifications, while preserving or improving the overall technical integrity of the FM band.”¹⁴ The purpose of the above quoted subsection (a)(4) was to remove the spacing requirements for grandfathered second and third adjacent channels that had been imposed in 1987, and “to restore the previous Section 73.213 rule used between 1964 and 1987.”¹⁵ The 1997 order does not support Big City’s overreaching reading of the rule. On the contrary, the Commission stated that this rule change “would permit second and third-adjacent channel grandfathered stations to implement maximum class facilities, and/or change transmitter site with complete flexibility on second-adjacent and third adjacent channel short-spacings.”¹⁶ In other words, the Commission intended for a station such as KLYY(FM) to make a transmitter site or other facility modification to achieve maximum facilities within its class of station (*i.e.*, HAAT of 100 meters and effective radiated power of 6 kilowatts for a Class A station) without regard to whether such a change would exacerbate a pre-1964, grandfathered short-spacing. Accordingly, Big City’s proposed upgrade is not exempt from second and third adjacent channel spacing required by Section 73.207 and is subject to dismissal because it fails to must meet the minimum distance separation requirements for a new Class B1

¹³ See, e.g., *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 101 (1982); and *Cleveland and Ebenezer, MS*, 10 FCC Rcd 8807, 8808 (Allocations Br. 1995).

¹⁴ *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840, 11851 (1997)

¹⁵ *Id.* at 11847.

¹⁶ *Id.*

allotment.¹⁷

17. Second, our interpretation of Section 73.213(a)(4) is buttressed by our past practices. In the rulemaking proceeding that conferred grandfathered status on stations such as KLYY(FM), the Commission denied a similar request by a Class A station to upgrade its facilities even though it was short-spaced to two stations on second adjacent channels. Therein, the Commission stated:

This party is, in effect, asking us to make a special case of a particular Class A station and to permit it to operate with 40 kw power or almost the same as a Class B facility, even though it is only about one half the required separation. This we cannot do. However, we are of the view that the relief offered herein to short-spaced stations will help this station in improving its signal and coverage. . . .¹⁸

18. Regarding our past practice, we also note that Big City has not cited any case in which we permitted grandfathered stations to upgrade their facilities beyond the maximum allowed in their class. We have, however, permitted pre-1964 grandfathered, short-spaced stations to change their communities of license without changing their transmitter sites or technical facilities because no new short-spacings were created, no existing short spacings were exacerbated, and the potential for interference between the currently short-spaced stations was not increased.” Similarly, we have allowed a pre-1964, grandfathered, short-spaced station to substitute an equivalent Class A channel at a different transmitter site in order to reduce a second-adjacent, grandfathered short-spacing and to improve line of sight coverage to the station’s service area.²⁰ We have also permitted one pre-1964, grandfathered short-spaced station to change its community of license and transmitter site on its same channel and class because it eliminated two grandfathered short-spacings and significantly reduced a third short spacing from 72.54 to 28.1 kilometers.” However, even though the latter case enabled a grandfathered 3 kW Class A station to increase its effective radiated power to 6 kilowatts, such an increase in power to the maximum permitted within its same class of channel is not an upgrade and is, therefore, distinguishable from Big City’s proposal to upgrade its Arcadia station from Class A to Class B1. Further, we noted in that case “that the relocation of the station’s transmitter site will not adversely affect any population that now receives interference-free service.”²²

19. Third, the Big City counterproposal is subject to dismissal because it fails to specify a theoretical fully-spaced reference site.²³ This requirement applies to upgrades requested through rulemaking petitions. Section 73.207(a) provides that [t]he Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation

¹⁷ While the petitioner withdrew its reply comments making similar arguments about the meaning of Section 73.213(a)(4), our consideration of this issue is independent of that pleading.

¹⁸ *Revision of FM Broadcast Rules*, 40 FCC 868,878 (1964).

¹⁹ See, e.g. *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992). *Oceanside and Encinitas, California*, 14 FCC Rcd 15302 (1999); and *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768 (Allocations Br. 2001).

²⁰ *San Rafael, California*, 5 FCC Rcd 1892 (Allocations Br. 1990).

²¹ *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (Allocations Br. 2001), *application for review pending on other grounds*.

²² *Id.* at 13877.

²³ See 47 C.F.R. § 73.207.

requirements of this Section.”²⁴ This requirement also applies to one-step upgrade applications, which allow an applicant to modify the FM Table of Allotments and its station authorization through a single application. These applications “must meet either the minimum spacing requirements of Section 73.207 at the site specified in the application, without resort **to** the provisions of the Commission’s Rules permitting short spaced stations as set forth in Sections 73.213 through 73.215 **or** demonstrate by a separate exhibit attached to the application the existence of a suitable allotment site that fully complies with Sections 73.207 and 73.315 without resort to Sections 73.213 through 73.215.”²⁵ The rationale for this approach at the rulemaking or application stage is that:

The Commission has a strong interest in preserving the integrity of the Table **of** Allotments and the mileage separation criteria upon which the Table is based. Strict adherence to the spacing requirements reflected in the Table is ‘necessary . . . in order to provide a consistent, reliable, and efficient scheme of [allotting] channels.’²⁶

Indeed, even for one-step upgrade applicants that may use the short-spacing provisions of Section 73.215 in their applications, we have refused to waive the requirement of specifying a fully spaced, theoretical reference site that complies with Section 73.207 because grant of such relief “could undermine this system by opening the way for other similarly situated stations to claim a right to waiver of allotment spacing requirements.”²⁷ Big City’s proposed upgrade for Station KLYY(FM), Arcadia, is short-spaced to Stations KROQ-FM and KLVE-FM, Los Angeles.

20. Fourth, although the proposed upgrade for Station KLYY(FM) would ameliorate two, grandfathered short-spacings described earlier, our engineering review reveals that the proposal would actually increase the area and populations that receive interference. Currently, from its transmitter site as a Class **A** station, KLYY(FM) provides interference to an area of 35 square kilometers (13.5 square miles) with a population of 150,711 with respect to Stations KROQ-FM and KLVE(FM), Los Angeles. From the proposed upgrade, Class B1 site, the station will provide interference to 250,309 people within an area of 63 square kilometers (24.3 square miles) with respect to these stations. As a result, this case is different from *Albemarle and Indian, Trail, North Carolina*, in which the reduction in the grandfathered short-spacings did not adversely affect populations receiving interference free **service**.²⁸

21. Accordingly, **IT IS ORDERED**, That the counterproposal filed by Big City Radio and Morris Communications **IS DENIED**.

22. Pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, **0.204(b)** and 0.283 of the Commission’s Rules, **IT IS ALSO ORDERED**, That effective November 25, 2002, the FM Table of Allotments, Section 73.202(b) **of** the Commission’s Rules, **IS AMENDED** for the community listed

²⁴ 47 C.F.R. § 73.307(a)

²⁵ 47 C.F.R. § 73.203 (Note)

²⁶ *Chester and Wedgefield, South Carolina*, 5 FCC 5512 (1990), *denying application review*, 4 FCC Rcd 4503 (Policy and Rules Div. 1989), *review denied sub nom. Chester County Broadcasting Co. v. FCC*, Case No. 90-1496 (D.C. Cir. June 6, 1991) (waiver of spacing rule at rulemaking stage denied because the provision of additional emergency information to residents was not sufficiently compelling to outweigh the Commission’s traditional prohibition on short-spaced allotments).

²⁷ *Thunderbolt Broadcasting Company*, 13 FCC Rcd. 6959, 6962 (1998).

²⁸ *Albemarle and Indian Trail, North Carolina*, *supra* note 21

below:

Community

Channel No.

Murrieta, California

281A

23. A filing window for Channel 281A at Murrieta, California, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

24. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED

25. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2120. Questions related to the application filing process for Channel 281A, Murrieta, California, should be addressed to the Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau